



**Town of Arlington
Legal Department**

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To: Arlington Redevelopment Board; Jennifer Raitt, Director of Planning and Community Development

From: Douglas W. Heim, Town Counsel

A handwritten signature in blue ink, appearing to be "DWH", enclosed in a circular scribble.

Date: August 13, 2020

Re: Docket No. 3602

Members of the Arlington Redevelopment Board ("ARB"), I write with respect to a series of concerns and criticisms regarding the role of this Office in advising you on the Special Permit Application for 1207-1211 Massachusetts Avenue, Docket No. 3602 because the Select Board has entered a Purchase and Sale Agreement with the applicant; and further to provide a public opinion on the scope and limitations of ARB authorities in environmental design review ("EDR") as a resource for the Board's general use whatever its ultimate decision is regarding Docket No. 3602, and to inform the public.

On the first score, the role of Town Counsel is to provide legal representation and advice to all Town officials, department, boards and commissions. To that end this Office provides direct legal counsel to a wide range of Town professionals and volunteers, and supervises the hiring and use of outside legal counsel as authorized by the Town Manager. As you can well imagine, the perspectives and priorities of every town official and board (or individual members of a board) do not always align perfectly. It is nonetheless the duty of this Office to faithfully represent you and other public officials and bodies in the discharge of your duties. Indeed there

are numerous and obvious examples of instances where this Office represents, the decisions, positions, and authorities of one board or official in the presence of disagreement among other officers of the Town as is typical in a Town form of Government. The alternative is not consistent with the Town form of government or the Arlington Town Manager Act, and courts unnecessary Balkanization of the Town's public bodies.

Hence, with respect the Select Board's interest in the sale of the property located at 1207 Massachusetts Ave (as authorized by Town Meeting), which is contingent upon receipt of a special permit from you for mixed use development, the suggestion that this Office would unduly influence or mislead the Board because of its role in representing the Town generally, or the Select Board, is an unmerited distraction. While I do not assume that such an articulation is necessary for ARB members, permit me to re-iterate that the ARB is within its authority to deny (or grant) such special permit applications based on the special permit criteria and EDR standards set forth in Zoning Bylaw and authorized, but not mandated by c. 40A sec. 9.

As a secondary matter, other members of the public have expressed concern about the provision of legal advice to ARB members or professional staff by conversation or less formal correspondence. This concern is understandable to a degree for a variety of reasons, though has practical and legal limitations. The Board is entitled to formally request written legal opinions. However, the Board, members of the Board, and other Town officials are also entitled to seek confidential legal advice and to ask legal questions in an attorney-client privileged manner not limited to written correspondence or memoranda. As a practical matter, legal questions can and do arise within a confined timeframes, or within finite resources available to this Office, which will not afford the ability to respond with "formal" opinions. Similarly, as a matter of common sense, in instances where a legal opinion has been expressed in e-mail correspondence shared with the Board, a formal memorandum is not required to validate such an opinion.

In the context of Docket No. 3602 and more broadly, members of the Board and staff made statements about the opinion of counsel on the ARB's scope of authority to modify Zoning Bylaw provisions and requirements as part of its EDR process. Fair and important questions about the basis of that opinion as expressed at your meeting (and its limitations) arose for interested persons therefrom, and as such, I have provided a detailed Memo for the ARB and public's information on said issue, which is not anchored specifically to Docket No. 3602, but fully states the opinion of this Office.